

STATE OF MICHIGAN
COURT OF APPEALS

STEPHEN D. EVANS and ERNEST G. NASSAR,

Plaintiffs-Appellants,

v

DETROIT EDISON,

Defendant-Appellee.

UNPUBLISHED

May 15, 2003

No. 239077

Wayne Circuit Court

LC No. 01-124624-NZ

Before: Markey, P.J., and Cavanagh and Hoekstra, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's grant of summary disposition in defendant's favor on the ground that the Michigan Public Service Commission (MPSC) had primary jurisdiction over this action against defendant, a public utility. We affirm.

In July of 1998, a thunderstorm caused tree damage, downed power lines, and widespread power outages in plaintiffs' neighborhood and the surrounding areas. Defendant held an easement along the back of plaintiffs' property through which its power lines were located. As a consequence of the magnitude of damage caused by the storm, defendant implemented its catastrophic storm response procedures which included its policy to cut tree debris into manageable sizes and leave it in the easement for removal by the property owner. When performing routine power line clearance maintenance, defendant removes associated tree debris. However, when defendant responds to catastrophic storm damage its "crews must work quickly to remove downed wire hazards and restore power to thousands of customers;" therefore, such debris is left to be disposed of by the property owner.

Plaintiffs filed the instant "class" action after they were required to gather and move such debris to their street-side curb for removal by the Department of Public Works. Plaintiffs claimed that they were injured "by the loss of the use and enjoyment of their property, and incurred the burden and cost of clearing, collecting, and removing said debris." Plaintiffs requested the lower court to "enter an order compelling Defendant to change its maintenance policy subsequent to 'storm damage' of not removing maintenance debris from property burdened by or abutting easements carrying Defendant's electrical transmission lines, to one of removal of cut or fallen tree parts and other debris in all maintenance procedures without distinction, restoring property of Plaintiffs and members of their class to a status quo ante condition." Plaintiffs also requested that the court grant "other relief as may be deemed just and equitable," as well as costs and attorney fees.

In response to plaintiffs' complaint, defendant filed a motion for summary disposition, pursuant to MCR 2.116(C)(7), arguing that the doctrine of primary jurisdiction applied and required the trial court to defer the action for adjudication by the MPSC, the administrative agency with exclusive regulatory authority over public utilities. See MCL 460.6. In response to defendant's motion, plaintiffs argued that their complaint sounded in tort and, thus, the doctrine of primary jurisdiction was inapplicable. The trial court agreed with defendant that plaintiffs' "storm debris policy" claim, which sought to compel defendant to modify this policy, must be filed with the MPSC. The trial court stayed plaintiffs' damage claim contingent on plaintiffs filing their claim with the MPSC within forty-five days, after which, if plaintiffs failed to file, the entire action would be dismissed without prejudice upon defendant's motion. Thereafter, plaintiffs failed to file their claim with the MPSC and their complaint was dismissed. Plaintiffs appeal.

Plaintiffs argue that the trial court, as a court of general jurisdiction, was the proper forum to adjudicate plaintiffs' claims. We disagree. This Court reviews a trial court's decision on a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The applicability of the primary jurisdiction doctrine is, likewise, reviewed de novo on appeal as a question of law. *Michigan Basic Prop Ins Ass'n v Detroit Edison Co*, 240 Mich App 524, 528; 618 NW2d 32 (2000).

In their complaint, plaintiffs claimed that defendant's maintenance procedures included "negligently and arbitrarily dumping . . . debris" on "the property of plaintiffs and others of their class" causing them to be "damaged by the loss of the use and enjoyment of their property, and incurred the burden and cost of clearing, collecting, and removing said debris." However, plaintiffs' claim arose after a storm struck their area and defendant implemented its catastrophic storm response procedures which provided that cut tree debris be left in the easement for removal by the property owner. Therefore, any "negligent" and "arbitrary" dumping of tree debris by defendant occurred as a consequence of its catastrophic storm response policy.

MCL 460.6 provides, in pertinent part:

The public service commission is vested with complete power and jurisdiction to regulate all public utilities in the state The public service commission is vested with the power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of public utilities. The public service commission is further granted the power and jurisdiction to hear and pass upon all matters pertaining to, necessary, or incident to the regulation of public utilities

The doctrine of primary jurisdiction recognizes this broad grant of authority to the MPSC and applies "where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body" *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 197-198; 631 NW2d 733 (2001) (citations omitted).

As a public utility, defendant is subject to the jurisdiction of the MPSC and must abide by the administrative rules promulgated by the MPSC. See 1992 MR 10, R 460.2101. Under

MPSC Rule 505, defendant was required to “adopt a program of maintaining adequate line clearance” that included tree trimming. 1996 MR 4, R 460.3505. Defendant claims that its catastrophic storm response policy was adopted, pursuant to 1992 MR 10, R 460.2105, as part of its line clearance program. MPSC Rule 5 provides:

A utility may adopt additional rules governing relations with its customers that are reasonable and necessary and that are not inconsistent with these rules. The utility’s rules shall be an integral part of its tariffs and shall be subject to approval by the commission. [Rule 460.2105.]

Whether defendant’s catastrophic storm response policy was appropriately adopted as part of its mandated line clearance program is the decisive question presented by plaintiffs’ case and is properly within the jurisdiction of the MPSC.

In determining whether a court should defer to an administrative agency under the doctrine of primary jurisdiction, the court generally considers (1) “the extent to which the agency’s specialized expertise makes it a preferable forum for resolving the issue,” (2) “the need for uniform resolution of the issue,” and (3) “the potential that judicial resolution of the issue will have an adverse impact on the agency’s performance of its regulatory responsibilities.” *Rinaldo’s Const Corp v Michigan Bell Tel Co*, 454 Mich 65, 71; 559 NW2d 647 (1997) (citation omitted). Here, all three criteria weigh in favor of deferral to the MPSC. First, defendant was allegedly acting under the MPSC’s mandate that it implement a line clearance program when it developed and instituted its catastrophic storm response policy, implicating the MPSC’s unique expertise on its regulatory scheme. Second, the need for uniformity and consistency is apparent because of the widespread impact of the decision on other customers, as well as on defendant’s storm response efforts. Third, plaintiffs’ case implicates the MPSC’s regulatory responsibilities in that it presents an issue relating to defendant’s “obligations to [its] customers as governed by the regulatory scheme.” *Michigan Basic Prop Ins Ass’n, supra* at 538. Therefore, we agree with the trial court that the MPSC was the proper forum to adjudicate plaintiffs’ claim against defendant. Consequently, we also agree with the trial court’s decision to stay further proceeding until the MPSC rendered its decision as to whether defendant’s catastrophic storm response policy comported with its regulatory scheme. Accordingly, because plaintiffs failed to file their action with the MPSC, summary disposition was properly granted in defendant’s favor.

Affirmed.

/s/ Jane E. Markey
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra